STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-750

October 3, 2003

VERIZON NEW ENGLAND, INC.
D/B/A VERIZON MAINE
InterLATA Entry Amendment to the Implementation Plan for the Introduction of IntraLATA Presubscription (ILP)

ORDER DENYING WAIVER REQUEST

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. INTRODUCTION

On December 5, 2002, Verizon Maine (Verizon or the Company) filed a Request to Amend the Commission's May 30, 1997 Order Approving Stipulation in the Docket No. 1997-204, Verizon Maine (formerly known as New England Telephone Company d/b/a NYNEX), Implementation Plan for the Introduction of IntraLATA Presubscription (ILP). The purpose of the requested amendment is to eliminate the prohibition in the Stipulation against the marketing of intraLATA toll services by Verizon on customer-initiated telephone calls to Verizon call centers. For reasons described below, we deny the Company's request.[1]

II. BACKGROUND

This Docket was initiated by a petition filed by Verizon on December 5, 2002. Petitions to intervene were received from the Office of the Public Advocate, AT&T Communications of New England and WorldCom (now known as MCI). All petitions to intervene were granted. Following discovery on the Company's request and briefing by the parties, an Examiner's Report was issued on August 25, 2003. Exceptions to the Examiner's Report were filed by Verizon, and the OPA filed comments.

By the Order issued on May 30, 1997, in Docket No. 97-204, the Commission approved a Stipulation signed by Verizon (then known as NYNEX) and MCI (which subsequently merged with WorldCom) regarding Verizon's initial implementation of intraLATA presubscription (ILP), which is the ability of Verizon local service customers to utilize any intraLATA carrier on a presubscribed basis. One provision in the Stipulation precludes Verizon from marketing its intraLATA toll services to customers who contact the Company to either apply for local telephone service or to change or select their presubscribed intraLATA carrier. The Telecommunications Act of 1996 (TelAct) had been in effect for a little more than one year when the Commission issued its Order Approving Stipulation on May 30, 1997, but local competition was barely existent in Maine. Because

[1] Chairman Welch voted against this decision. See attached dissenting opinion.

of Verizon's status as the dominant LEC, concern existed that the Company would have an unfair advantage in marketing its own intraLATA toll services to customers who called the Company to either establish local service or effect an ILP presubscribed interexchange carrier (PIC) change.[2]

III. VERIZON'S POSITION

In the instant Petition, Verizon asserts that the limitation on its marketing activities contained in the 97-204 Stipulation is no longer necessary or appropriate, it unfairly penalizes the Company, and it unduly hinders customer access to information about Verizon's available toll plans. Verizon also states that it will not market toll service to in-bound callers unless the customer affirmatively indicates a desire to learn more about Verizon's toll plans. Verizon says that the marketplace for both toll and local service has changed drastically since the Stipulation was approved. Verizon claims that more than half of its business customers and more than one third of its residential customers presubscribe to an intraLATA toll carrier other than Verizon. Therefore, Verizon asserts that its Maine customers are fully knowledgeable that there are carriers other than Verizon that can carry intraLATA calls on a presubscribed basis.

Verizon also asserts that it has no competitive advantage in the provision of toll service as the incumbent provider of local service. The Company says that it is no longer correct, as implied in the Stipulation, that local telephone customers must contact Verizon in order to establish local service. The Company argues that the Commission determined, in its support for Verizon's Section 271 application to the Federal Communications Commission (FCC), that the market for local service in Maine has been fully opened to competitors, and any carrier may compete for the provision of local, toll and other telecommunications services. The Company asserts that a "significant number" of end users now take local service from competing carriers, and that there are no barriers preventing an intraLATA toll service provider from also providing local service in competition with Verizon. Verizon states that customers who desire to change their presubscribed toll carrier can do so by contacting the carrier of their choice directly, and there is no need for those customers to contact Verizon.

Because other carriers are not restricted in any manner from cross-marketing their combined local, toll and ancillary services, Verizon asks that the Commission remove the restriction that is currently in place on its joint marketing abilities. Verizon states that presently it is the only company encumbered with marketing restrictions, and it argues that it must have marketing opportunities comparable to those available to other carriers if it is to compete effectively and respond to customers' needs. The Company asserts that it will not engage in any joint marketing unless a customer affirmatively indicates a desire to

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[2] Although Verizon was prohibited from providing interLATA (equivalent to interstate in Maine) toll service at the time the Docket 97-204 Stipulation was approved, the Company now is permitted to originate interLATA toll calls from within its territory in Maine. The FCC, which has jurisdiction over interstate traffic, allows Verizon to jointly market its interstate toll service with local service.

learn more about Verizon's toll plans. With its petition, the Company included an example of the text it proposes to use for its intraLATA marketing activities on customer-initiated calls.

IV. POSITIONS OF OTHER PARTIES

AT&T Communications of New England, Inc. (AT&T), the Office of the Public Advocate (OPA) and WorldCom each opposed Verizon's request for relief from the Docket 97-204 Stipulation.

AT&T asserts that if the restrictions are lifted, Verizon will be able to exploit its dominant position in the local exchange market to use, as a marketing opportunity to sell its intraLATA toll services, customer-initiated calls that can only be made to Verizon to establish local service or to make a PIC change. AT&T argues that Verizon's direct advantage in this regard would be to the detriment of other long distance competitors who lack such customer-initiated interaction. AT&T believes that it is premature to lift the current restrictions, and that doing so would be fundamentally inconsistent with the objectives of the 1997 Stipulation.

AT&T asserts that market competition requires that customers be aware of their choices, and it asserts that customers moving into a new service area in Maine will not be aware of their choices for long distance service unless the local service provider informs them of that fact. Also, AT&T argues that Verizon still commands a monopoly in their market for local service, and competition is only starting to occur as a few competitive local exchange carriers (CLECs) begin to offer packages of local and toll services. Finally, AT&T argues that Verizon should not be allowed to use any inbound customer calls related to its monopoly local exchange service to market its own long distance services, because Verizon's ability to leverage its local exchange monopoly into the competitive long distance market is not just a theoretical possibility, it is a practical reality.

The OPA urges the Commission to deny Verizon's petition because the Company is still the dominant provider of local exchange service in its Maine service area. OPA asserts that Verizon should not be permitted to use its unique local service advantage to market its instate toll service. The OPA also believes that Verizon should change its current recorded message that customers hear when they call the business office to apply for, or change, service, because that language is a violation of the original Stipulation.

The OPA argues that the Company's petition should be denied, because Verizon should not be allowed to use its unique advantage as the still dominant provider of local exchange service in Maine to market its instate toll service. The intended result of the 1997 Stipulation is still valid. Verizon should remain limited in its ability to market its instate toll service only in ways that are available to other instate toll providers. The OPA asserts that the condition of the instate toll market has not changed substantially since 1997. Even though there is a greater degree of toll competition, Verizon still remains the dominant provider, and it retains its virtual monopoly status in the local exchange market.

In addition, the OPA says that Verizon should change the current recorded message that customers hear while waiting for their business office call to be answered by removing the marketing language stating that the Company can provide the "convenience of one combined bill." The OPA asserts that the language exploits a non-competitively neutral advantage that Verizon has with its local exchange customers, because Verizon still is the predominant local exchange carrier.

The OPA argues that it is as important as ever to limit Verizon's ability to leverage its relationship with its captive customers, particularly because Verizon is now able to originate interstate toll calls from within its territory. OPA alleges that customers are confused by the term "long distance", in that they would not differentiate between instate service, provided by Verizon Maine and out of state calls, which are carried by Verizon Long Distance, an affiliate of Verizon Maine. Further, OPA states that a substantial number of customers who subscribe to toll service use a single carrier for both types of toll calls, and thus, there is a continuing link between the marketing of instate and interstate toll services. A discussion of either of these types of toll services would likely lead to a discussion of the other, so that Verizon would gain a back-door means to unfairly market its intraLATA toll services. While the FCC permits the joint marketing of local and interstate toll services, OPA believes that the Commission has a sufficient basis to exercise jurisdiction to restrict Verizon's marketing to local customers who must contact Verizon for local service or PIC matters. The OPA argues that there is little doubt that the ability to market its interstate services would have a substantial impact on Verizon's ability to leverage its local carrier status in order to market instate toll service to customers who initiate calls to Verizon, especially if Verizon continues to use the generic phrase "long distance." The OPA urges the Commission to deny Verizon's request and, thus, preserve a fair competitive playing field in the instate toll market.

Finally, the OPA asserts that Verizon has no intention of providing competitively neutral information to customers who call the Company's business office. The OPA argues that the Company's offer to read a random list of instate toll providers is disingenuous, because such a list would contain no information that would assist the customer in making a rational choice from among the hundreds of licensed toll providers. The OPA concludes that the Company is not interested in providing objective and competitively neutral information. The OPA argues that lifting the restrictions contained in the 1997 Stipulation would be contrary to the public interest, because the result would permit Verizon to increase its dominance in the toll market and would cause customers to make an uninformed choice as to their toll carrier.

WorldCom argues that Verizon failed to make a sufficient showing that the safeguards contained in the Stipulation can be lifted without harm to competition for instate toll services. WorldCom challenges Verizon's assertion that the markets for local and intraLATA toll service are open and fully competitive. WorldCom says the issue is one of market definition. WorldCom asserts that as a result of Verizon's continued market dominance in the local exchange market, a customer contact to establish local service presents Verizon with an opportunity to market its intraLATA toll services, to the detriment of its competitors. Finally, WorldCom argues that Verizon failed to present any empirical evidence to support its contention that the local market is fully competitive.

V. DISCUSSION AND DECISION

As discussed more fully below, we find that the restrictions contained in the 1997 Stipulation in Docket No. 97-204 retain their relevance and necessity, and we deny Verizon's request that they be modified. Further, we find that the recorded message that Verizon plays to customers who are waiting on hold for a service representative constitutes marketing activity that is in violation of the Docket 97-204 Stipulation provisions, and we order Verizon to immediately cease the use of that recording. While we find Verizon's inclusion of certain phrases in its message to be a violation of the Stipulation, we will not further penalize the Company, because we believe a genuine dispute about the nature of the message exists, and we have no evidence that Verizon intentionally violated the terms of the original Stipulation. Rather, Verizon apparently believed that the wording of the message was a permitted exercise of its federal joint marketing authority.

While their purpose was not explicitly stated in either the Stipulation or the Order Approving the Stipulation, the provisions in the 1997 Stipulation that Verizon seeks to modify, prevent the Company from using its dominant position in the local market, which is the residual effect of decades of government protected monopoly status to enhance its ability to market its instate toll services when customers contact the Company to initiate local service or change their presubscribed instate toll carrier.[3] At the time the Stipulation was approved, the TelAct was a little over one year old, and local competition was almost non-existent. Verizon clearly had a dominant competitive advantage over other instate toll carriers, in that existing and prospective local service customers were required to contact Verizon to initiate or change local service or change their presubscribed instate toll carrier.

Today, the local exchange market has evolved somewhat, in that there now are approximately 100 companies certified to provider competitive local service in Maine. Market shares for local service, however, have not changed to a significant degree, although there is no data in the record of this case that quantifies the market shares of Verizon and other CLECs. Indeed, no party introduced empirical evidence to support its position regarding the level of competition in the local and instate toll markets. Verizon asserted that it has lost a significant share of the instate toll market, but it provided no actual evidence to quantify that loss. The Company also did not refute claims from other parties in this case that it retained a very significant share of the local exchange market.

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[3] In its reply brief, Verizon states that that "[o]nly if the customer, in response to Verizon's recommendation, indicates a desire to hear more about Verizon's toll plans will the marketing of Verizon's toll services proceed." This reflects a very narrow definition of marketing. According to the script accompanying Verizon's petition, all callers will be told the following: "For your regional toll, I recommend Verizon. We have a number of plans designed to meet your calling needs. Would you like to hear more about these plans . . .?" In short, if its petition is granted, Verizon would expressly recommend its toll service to all callers.

We have briefly examined the annual report information provided by LECs, and while some data may be incomplete or need clarification, it appears that Verizon's share of the local exchange market is still over 90%, indicating that it retains a substantial advantage in the area of customer contacts. While Verizon's entry into the interstate toll market was predicated on a finding that the local exchange market in Maine was fully opened to competition, that finding does not mean competition has actually grown to a degree that can be considered robust. The fact that Verizon has removed the barriers to entry is not equivalent to finding that vigorous competition exists.

Verizon's assertion that it has no ability to condition the receipt of local service from itself upon the taking of its toll service is correct, but it is also not the reason for the restrictions. The fact that Verizon cannot tie the provision of local service to the taking of its instate toll service by customers does nothing to diminish the concern that led to the inclusion of the restriction in the original Stipulation: by virtue of its near-monopoly status in local exchange service, Verizon obtains many more opportunities to market its toll service when a customer wants to initiate local service, change service locations to another one of Verizon's exchanges, or to initiate or change the customer's PIC. While other carriers may offer bundled local and instate (and probably interstate) toll service, so far those competitors have made only slight progress in penetrating the local exchange market. We believe it is premature at this time to lift the marketing ban that is imposed on Verizon.[4] If, at some future time, the Company can show that competition is sufficiently developed in the local service market, it should present that evidence, and we will consider lifting the marketing restriction.[5]

As for the recorded message that the Company plays to customers who are waiting for a service representative, we find that its announcement that Verizon now provides both local and long distance service "with the convenience of one combined bill" moves the message across the "grey-line" threshold from information provision into the realm of "marketing." Although marketing is not defined in the Stipulation, it is generally acknowledged to involve promotion of a company's products or services to encourage

[4] Like its competitors, Verizon has numerous other means by which it can aggressively market intrastate toll service, and thus, we do not view these restrictions as working to the detriment of consumers. Along these lines, we note that the Public Advocate, who is charged with representing the interests of small customers in utility matters, strongly supports maintaining the restrictions.

[5] Verizon appears to believe that the only possible justification for maintaining the restrictions in the Stipulation would be if it had a dominant position in the intrastate toll market. Even if that were true, it is by no means clear that Verizon's petition should be granted, given that the Company has more than half of the residential presubscribed, intrastate toll market and a very significant share of that market for business customers. In addition, the Legislature has demonstrated in its treatment of electricity distribution utilities that there may be reasons for putting marketing restrictions on a monopoly gatekeeper even when that entity currently has no share of the market for the service that it or an affiliate seeks to sell. *See* 35-A M.R.S.A. § 3205.

purchase by consumers. We believe Verizon's recorded message does just that, and therefore, it falls within the prohibition contained in the 1997 Stipulation. Verizon must cease using that message as soon as reasonably possible.

Because we believe that there was a genuine dispute about the nature of the message, we will not further penalize the Company for using the recorded message in violation of the 1997 Stipulation. We will require it to stop using the prohibited language and to have any revised message approved by the Director of Consumer Assistance.

Therefore, we

O R D E R

1. That Verizon's request to modify the Stipulation approved in Docket 1997-204 is denied; and

2. That, as soon as reasonably possible, Verizon must discontinue use of the recorded message that customers hear while waiting for a customer service representative. If Verizon chooses to revise its recorded message, it must receive approval for any proposed replacement language contained in the message from the Director of the Consumer Assistance Division.

Dated at Augusta, Maine, this 3rd day of October, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR:	Diamond Reishus
COMMISSIONER VOTING AGAINST:	Welch (See Attached Dissenting Opinion)

Dissenting Opinion of Chairman Welch

I respectfully dissent.

My colleagues have, in my view, answered the wrong question. The question is not, as they would have it, whether Verizon might gain some advantage by being able to market its in-state toll services to customers who call for local wireline service: the answer to that question is clearly that Verizon would enhance its prospects for a sale. The proper question, however, is whether granting the advantage Verizon seeks here would be detrimental to competition in the in-state toll market. Because I believe that granting the request is as likely to stimulate competition as it is to damage it, and that competition would not suffer, I would grant the requested relief.

The record fully supports the view that the in-state toll market is sufficiently competitive to permit us to conclude that the removal of the restriction will have no adverse impact on the competitiveness of that market. This is not the same, of course, as saying that the removal would have no impact on Verizon's ability to sell its product. But the mere fact that Verizon's prospects may be improved relative to its competitors is not the same as saying that competition will be damaged (the antitrust laws, after all, are designed to protect competition, not competitors). While the evidence of Verizon's continuing loss of market share in presubscribed lines might itself be enough to warrant the removal of the restriction, the fact is that Maine consumers have a enormous variety of options from which to choose when making an in-state toll call. In addition to using their presubscribed wireline service to make such a call, consumers can use "dial-around" services, pre-paid toll service cards (available at, among other places, convenience stores, post offices, buying clubs, and grocery stores), and wireless services (many of which specifically advertise the advantage of using their services as an alternative to wireline toll). Thus it is wrong to conclude that Verizon retains anything approaching two thirds of the instate toll market simply because Verizon may have residential presubscriptions at or near that level. While it is impossible to determine exact shares of the in-state toll market (because most of the substitute services operate, appropriately, below the regulatory radar), the Verizon share is surely far less. In this context, I simply do not credit the view that, if customers who call for basic service hear a sales pitch, after having been told that they have a variety of choices for in-state toll, they will be unduly influenced into buying that service from Verizon.

The majority supports its retention of the restrictions in part by analogy to the restrictions placed by the legislature (with the commission's full support) on the marketing of energy by transmission and distribution utilities, and indeed suggests that the logic of the restrictions in the electricity market would support retaining restrictions here even if Verizon has a zero market share. There are undoubted similarities between the two situations: in both cases, there is a dominant provider of a "basic" service and a related competitive service. Closer examination, however, suggests that the differences overwhelm the similarities. First, and perhaps most important, while an electric T&D company is a "gatekeeper" in an almost literal sense (you cannot, unless you generate your own electricity, obtain electric energy without purchasing T&D company services), in the telephone market there are at least two close substitutes for Verizon's basic service for those who wish to make an in-state toll call. Customers with wireless service (a large and increasing proportion of Maine's consumers) can make such calls, as can subscribers to the internet (using, for example, cable modem service) who take advantage of Voice Over the Internet Protocol. Second, we are reviewing the value of the marketing restriction not at the outset of an unfamiliar and untested market (as was the case with electricity), but after almost two decades during which customers have had to buy from someone other than Verizon for at least some (i.e. their interstate) toll services, and after six years during which any new customer coming to the Verizon system for basic service has been given no information whatever about Verizon's in-state toll services (all the while being told explicitly that he or she has a choice of in-state toll providers). How many consumers could be left who do not understand that there are options for toll service beyond Verizon? This is far different from the situation faced in the electricity market, where the legislature appropriately feared the "power of incumbency" in a nascent market.

The best argument in favor of retaining the restriction may be that the particular advantage in the market that Verizon would gain if the restriction is removed -- namely, the fact that many (though not all) people seeking local service must as a practical matter deal with Verizon -- should not be allowed because Verizon's dominant position is the product of a century of franchise privilege. Put another way, Verizon should not be able to leverage, to any extent, the value of something it was "given" into a competitive market. If we were debating this issue in 1984 (when toll services were first split from local services) or even 1997 (when ILP was new to Maine), I might find this argument compelling. Here too, however, I believe that the healthy development of the in-state toll market, coupled with the erosion (though undoubtedly slower) of the value of the "local franchise" (which in any case has disappeared as a legal matter with the passage of the Telecommunications Act of 1996), militate against the differentiation espoused by the majority. At a certain point, it seems to me, we should look at the market as it stands, and not just where it came from. A fairer test, in my view, is whether the particular advantage (here the fact that people calling for local service generally call Verizon) is likely to damage competition in the market about which we are concerned (here the in-state toll market). Under this test, I conclude that the in-state toll market will survive very nicely, and thus find no sound policy reason for perpetuating the regulatory restriction.

Missing too from the majority's analysis is sufficient attention to what is lost to consumers if the restriction is not removed. Consumers in the telecommunications area have legitimately decried the lack of convenience that characterize that market. The practical effect of the majority's decision is that where a consumer actually wants to find out about Verizon's in-state toll services at the same time he or she is calling for basic service, he or she is prohibited -- by the Maine PUC -- from doing so. Why not allow the conversation to take place? Perhaps the customer, having watched television or read a newspaper in the preceding few months, is aware of the possibility of various choices, and having just been told that he or she has a choice of in-state toll services, would actually like to hear some details about one of them without making a separate call. It is certainly not obvious to me that a consumer will thank us for having eliminated that possibility on the theory that Verizon will be able to exert undo influence over the choice. Moreover, if you conclude, as I do, that the in-state toll market is fiercely competitive and that price is the primary basis for customer choice, then we should be seeking to increase, not limit, the opportunities for sellers to describe their offerings to the public.

I do not wish to overstate the importance of this decision. It is certainly true, as the majority points out, that Verizon is permitted to engage in joint marketing of its basic and toll services in other contacts with its customers. It may also be the case that, instead of representing an over-fondness for regulatory intervention, the majority view simply represents a different conclusion concerning the status of the in-state toll market (though if the latter is the case, I think it would be appropriate to provide somewhat better guidance to Verizon with respect to what would have to change to warrant Verizon's renewing its request). This commission has, as a general matter, recognized that regulatory interventions in the marketplace should be re-examined and re-evaluated regularly, on our own motion if necessary, to ensure that they are still serving a useful purpose. I believe it is unfortunate that in this case we have missed the opportunity to remove a vestigial intervention.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.